

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**STATE OF MISSOURI EX REL
CHRIS KOSTER**

RELATOR,

**v.
THE HONORABLE DANIEL GREEN,
CIRCUIT JUDGE OF COLE COUNTY,
AND MARILUE HEMMEL, CIRCUIT
CLERK COLE COUNTY CIRCUIT COURT**

RESPONDENTS.

DOCKET NUMBER WD75820
DATE: December 26, 2012

Appeal From:

Cole County Circuit Court
The Honorable Daniel Green, Judge

Appellate Judges:

Writ Division: Cynthia L. Martin, Presiding Judge, Joseph M. Ellis, Judge and Mark D. Pfeiffer,
Judge

Attorneys:

Michael J. Spillane, Jefferson City, MO, for relator.
Ameer Gado and Daniel F. Harvath, St. Louis, MO, for respondents.

MISSOURI APPELLATE COURT OPINION SUMMARY

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CHRIS KOSTER,**

RELATOR,

v.

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RESPONDENTS.

No. WD75820

Cole County

Before Writ Division: Cynthia L. Martin, Presiding Judge, Joseph M. Ellis, Judge and Mark D. Pfeiffer, Judge

This is an original proceeding in certiorari to review the record in the case of *Allen v. Dormire*, Circuit Court of Cole County, Missouri, Cause No. 11AC-CC00634. In that case, the habeas court issued a writ of habeas corpus to George Allen Jr. vacating Allen's 1983 conviction of capital murder, rape, sodomy, and first degree burglary, and commanding that Allen be released from custody.

We refuse to quash the record of the habeas court.

Writ Division holds:

1. Our review on a writ of certiorari is limited to determining whether the habeas court exceeded its authority to grant habeas relief or abused its discretion in issuing the writ of habeas corpus.

2. The habeas court concluded that evidence not made available to Allen at trial satisfied the essential elements of a *Brady* claim, and fell within the gateway "cause and prejudice" exception permitting habeas review of otherwise procedurally defaulted claims.

3. To prevail on a *Brady* claim, Allen was required to show (i) that undisclosed evidence is favorable to him, either because it is exculpatory or because it is impeaching; (ii) that the evidence was suppressed by the State, either willfully or inadvertently; and (iii) he was prejudiced.

4. To demonstrate cause and prejudice in connection with a *Brady* claim, Allen was required to show that evidence was not disclosed to him due to a cause external to his defense and that he was prejudiced.

5. The prejudice required to establish both a *Brady* violation and the gateway of cause and prejudice is identical.

6. The State concedes the first two elements of Allen's *Brady* claim, and concedes that Allen has established "cause" in connection with the gateway of cause and prejudice. The State contests only whether the evidence not disclosed prejudiced Allen.

7. To establish *Brady* prejudice, Allen was required to demonstrate that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in his verdict. The question is not whether Allen would more likely than not have received a different verdict with the evidence, but whether there is a reasonable probability that the outcome of his trial would have been different.

8. Undisclosed serological reports, fingerprint information, evidence that an essential witness had been hypnotized, and a missing inaccurate drawing of the crime scene prepared by Allen, were found by the habeas court to be prejudicial. The habeas court's conclusion is not clearly against the logic of the circumstances then before the court and is not so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.

9. The State contends that Allen confessed, and that his confession was sufficient to support Allen's conviction initially, and would have remained so even if discounted in its reliability by the undisclosed evidence. The State thus contends that it was an abuse of discretion to afford Allen habeas relief. The State misapprehends the standard required to demonstrate prejudice. The question is not whether Allen could still have been convicted had the jury heard all of the undisclosed evidence. The question is whether the cumulative effect of the undisclosed evidence leaves us with the sense that the likelihood of a different result is great enough to undermine confidence in the outcome of Allen's trial. Applied to this case, we are required only to determine whether the habeas court abused its discretion in concluding that there is a reasonable probability that the jury, had it heard the undisclosed evidence, could have acquitted Allen *notwithstanding* his confession.

10. Allen stridently contested the voluntariness of his confession at his trial. The undisclosed evidence could reasonably have influenced the jury's willingness to accept Allen's confession as voluntary and reliable. The habeas court cannot be said to have abused its discretion in reaching the conclusion that Allen met his burden to demonstrate a reasonable probability of a different outcome sufficient to undermine confidence in the fairness of his trial.

11. Allen's conviction of capital murder, rape, sodomy, and first degree burglary in connection with the February 4, 1982 murder of Mary Bell is vacated. Unless retried within the time frame set forth in the opinion, Allen shall be immediately discharged from the State's custody without need of any further order from this, or any other court.

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